

A YIP YEE FOO v. EDMUND CHARLES LIEBENBERG

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA

B [CIVIL APPEAL NO: W-02-2712-11-2012]
7 OCTOBER 2014

C **CIVIL PROCEDURE:** *Contempt of court – Order of committal – Appellant compelled to purchase shares – Appellant contended that he did not have required sum to purchase shares and exhibited income tax self-assessment as evidence – Whether income tax self-assessment confirmed appellant’s financial status – Whether petitioner had proved prima facie case of contempt – Whether appellant raised reasonable doubt*

D The petitioner (‘the respondent’) had applied *via* encl. 75 to commit the fourth, sixth and ninth respondents in the High Court to imprisonment for contempt following their refusal to comply with a High Court order compelling the appellant to purchase the shares in ICB-Griffin Manufacturing Sdn Bhd and ICB-Griffin Marketing Sdn Bhd at the value of RM6,134,033 (‘the said sum’). The appellant submitted that he did not have the said sum to purchase the shares from the petitioner and in support of his contention, the appellant exhibited his income tax self-assessment as evidence. The High Court dismissed the evidence on the ground that it did not confirm the financial status of the appellant as there was no evidence it was accepted by the Inland Revenue Board. In agreement with the respondent, the High Court held that the fourth, sixth and ninth respondents’ acts of disobedience or non-compliance to be in breach of the order and interfered with the due administration of justice. The issue at hand was whether the respondent had proved a *prima facie* case of contempt and whether the appellant had raised a reasonable doubt.

G **Held (allowing appeal)**

Per Abdul Wahab Patail JCA delivering the judgment of the court:

- H** (1) If the High Court addressed its mind to what were the acts of disobedience, defiance and interference with the due administration of justice, it would find these are arguments founded upon failure to comply with the order to purchase the shares, which was not *ipso facto* refusal or neglect to comply with the order. (para 11)
- I** (2) The High Court failed to take into consideration that an income tax self-assessment form is not a mere statement since an individual who under-declares income or makes excessive claims for deductions or expenses is subject to penalty. (para 15)

- (3) Findings in a court of law is not a matter of the judge being satisfied or believing a party or a witness and not the other but upon what is the reasonable conclusion or finding that can be made upon facts that are safe to rely upon. For this purpose, a fact is safe to rely upon if it is not disputed or is agreed or is a finding of fact on a disputed fact upon evidence that are safe to rely upon. Safe to rely upon in this context is if the fact or evidence is disclosed and not disputed or upon checking and verification by the other party it is accepted or agreed. (para 19) A
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- (4) Not obeying or with knowledge failing to obey is not, *ipso facto* without more, proof of reasonable doubt. It cannot, therefore, amount to a *prima facie* case where if no evidence is presented by the other party it is sufficient to warrant a finding of proof beyond reasonable doubt. (para 20) C

Bahasa Malaysia Translation Of Headnotes

Pempetisyen ('responden') telah memohon, melalui lampiran 75, untuk mengkomitkan responden keempat, keenam dan kesembilan di Mahkamah Tinggi kepada penjara kerana menghina mahkamah susulan keengganan mereka mematuhi perintah Mahkamah Tinggi yang menggesa perayu agar membeli saham-saham dalam ICB-Griffin Manufacturing Sdn Bhd dan ICB-Griffin Marketing Sdn Bhd pada nilai RM6,134,033 ('jumlah tersebut'). Perayu menghujahkan bahawa dia tidak mempunyai jumlah sedemikian untuk membeli saham-saham daripada pempetisyen dan dalam menyokong hujahannya; perayu melampirkan penilaian sendiri cukai pendapatannya sebagai keterangan. Mahkamah Tinggi menolak keterangan tersebut atas alasan bahawa ia tidak mengesahkan status kewangan perayu kerana tiada keterangan bahawa ia diterima oleh Lembaga Hasil Dalam Negeri. Bersetuju dengan responden, Mahkamah Tinggi memutuskan bahawa tindakan ingkar atau ketidakpatuhan responden keempat, keenam dan kesembilan melanggar perintah tersebut dan telah campur tangan dengan pentadbiran keadilan. Isu yang timbul adalah sama ada responden telah membuktikan penghinaan mahkamah secara *prima facie* dan sama ada perayu telah membangkitkan keraguan munasabah. D
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Diputuskan (membenarkan rayuan)

Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

- (1) Sekiranya Mahkamah Tinggi telah mengarahkan mindanya kepada apakah tindakan-tindakan keingkaran, tentangan dan campur tangan pentadbiran keadilan, ia akan mendapati bahawa hujahan-hujahan ini berasaskan kegagalan untuk mematuhi perintah untuk membeli saham-saham yang mana bukanlah *ipso facto* keengganan atau pengabaian untuk mematuhi perintah tersebut. H
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- A (2) Mahkamah Tinggi gagal untuk mempertimbangkan bahawa borang penilaian sendiri cukai pendapatan bukanlah sekadar penyata kerana seseorang individu yang tidak menyatakan pendapatannya dengan secukupnya atau membuat tuntutan berlebihan bagi penolakan atau perbelanjaan tertakluk kepada hukuman.
- B (3) Dapatan dalam mahkamah tidak bergantung kepada sama ada hakim berpuas hati atau percaya bahawa satu-satu pihak atau saksi dan bukan satu lagi tetapi berdasarkan apakah kesimpulan munasabah atau dapatan yang boleh dibuat berdasarkan fakta yang selamat untuk disandarkan. Bagi tujuan ini, fakta adalah selamat untuk disandarkan sekiranya ia tidak dipertikaikan atau dipersetujui atau merupakan dapatan fakta berdasarkan fakta yang dipertikaikan atas mana keterangan adalah selamat untuk disandarkan. Selamat untuk disandarkan dalam konteks ini adalah sekiranya fakta atau keterangan didedahkan dan tidak dipertikaikan atau selepas diperiksa dan disahkan oleh pihak yang satu lagi, ia diterima atau dipersetujui.
- C
- D (4) Tidak mematuhi atau dengan pengetahuan gagal untuk mematuhi bukanlah, *ipso facto* tanpa lebih, bukti keraguan munasabah. Oleh itu, ia tidak boleh terjumlah kepada kes *prima facie* di mana sekiranya tiada keterangan dikemukakan oleh pihak yang satu lagi, ia cukup untuk
- E mewajarkan satu dapatan melampaui keraguan munasabah.

Case(s) referred to:

Eric Lau Man Hing v. Eramara Jaya Sdn Bhd & Ors [1998] 3 CLJ Supp 126 FC (*refd*)

Hadkinson v. Hadkinson [1952] 2 All ER 567 (*refd*)

R v. Poplar Borough Council (No 2) [1912] 1 KB 95 (*refd*)

F *TO Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 LNS 126 FC (*refd*)

Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal [1993] 3 CLJ 210 SC (*refd*)

Witham v. Holloway [1995] 183 CLR 525 (*refd*)

Legislation referred to:

G Companies Act 1965, s. 181

Rules of the High Court 1980, O. 45 r. 5, O. 52 r. 2(2)

For the appellant - Sulaiman Abdullah (Ramesh Sivakumar with him); M/s Ramesh & Loo

For the respondent - Oommen Koshy; M/s Skrine

H *[Appeal from High Court, Kuala Lumpur; Originating Petitions No: D5-26-3-1998 & D4-26-2-1998]*

Reported by Najib Tamby

JUDGMENT

- I [1] The sixth respondent in the High Court, Yip Yee Foo (“the appellant”) appealed to this court against the grant of the committal order on 30 October 2012 against him as follows:

- (a) Fine RM50,000 to be paid by 30 November 2012, in default one month's jail; A
- (b) Daily fine RM1,000 until contempt purged, in default one day's imprisonment.

[2] On 3 July 2013, after having read the written submissions and the record of appeal and having heard the oral submissions, this court, upon deliberation, allowed the appeal, set aside the order of the High Court and ordered the fine paid and that the deposit be refunded. The following are our reasons. B

Brief Background C

[3] The petitioner, under s. 181 of the Companies Act 1965, in the High Court, Edmund Charles Liebenberg, the respondent herein, ("the respondent"), had applied by encl. 75 to commit the fourth, sixth and ninth respondents in the High Court to imprisonment for contempt of court for refusing to comply with the High Court Order dated 11 August 2011. D

[4] That order on 11 August 2011 was for, *inter alia*, the appellant to comply with the order made on 31 March 2005 to purchase the shares in ICB-Griffin Manufacturing Sdn Bhd and ICB-Griffin Marketing Sdn Bhd at the value of RM6,134,033, the value as fixed by an order on 28 August 2008. E

[5] The originating petition was filed on 27 April 2012. Per the statement under O. 52 r. 2(2), the order of 11 August 2012 was served on 16 December 2011 on the appellant. The material part the appellant is alleged to have failed to comply with and violated the penal indorsement on are the following: F

- (i) jointly and severally purchasing the petitioner/applicant's shares in ICB-Griffin Marketing Sdn Bhd and ICB Manufacturing Sdn Bhd at the price of RM6,134,033 being the value of the said shares and the premium ordered thereon as assessed in accordance with the terms of the said order by the accountant appointed thereunder; G
- (ii) jointly and severally paying to the petitioner/applicant interest at the rate of 8% per annum on the sum of RM6,134,033 from 31 March 2005 to the date the sum is satisfied; and
- (iii) jointly and severally paying to the petitioner/applicant interest at the rate of 8% per annum on the sum of RM20,000 from 31 March 2005 to the date the sum is satisfied; H

within thirty (30) days of service of this order.

The High Court Grounds I

[6] In its grounds, the High Court set out that the respondent as petitioner had contended, and we quote:

- A a) The fourth, sixth and ninth respondents' acts of disobedience/or non-compliance of the High Court dated 11 August 2011 are in breach of the High Court duly indorsed with the Penal Code;
- B b) The fourth, sixth and ninth respondents' acts of non-compliance of the High Court Order dated 11 August 2011 interfered with the due administration of justice.

[7] Having correctly addressed the law as follows:

- (a) orders of court, unless stayed or set aside, must be obeyed: *Hadkinson v. Hadkinson* [1952] 2 All ER 567;
- C (b) motive for disobedience is irrelevant: *R. v. Poplar Borough Council* (No. 2) [1912] 1 KB 95;
- (c) the standard of proof required for contempt is the criminal standard of proof beyond reasonable doubt: *Witham v. Holloway* [1995] 183 CLR 525 HCA;
- D (d) wilfully, deliberately disobeying, or disregarding the order of the court is contempt: *TO Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 LNS 126; [1977] 1 MLJ 151;

the High Court stated that it had to take into account the following:

- E that the breaches are serious and have the effect of frustrating the order. The Respondents were silent during the valuation proceedings. The Respondent (sic) have refused and/or neglected to comply with the 2005 Order and subsequently to the Order made by this Court on 11.8.2011 to purchase the Petitioner's ICB shares as valued. The Respondents claimed
- F that they had no money or assets to purchase the petitioner's shares in the company to give effect to the order and swore various affidavits saying so.

[8] We pause to observe respondent's application was made under O. 45 r. 5 of the Rules of the High Court 1980. It is provided that:

- G **Rule 5. Enforcement of judgment to do or abstain from doing an act. (O. 45 r. 5)**

(1) Where:

- H (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or

...

- I then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say:

(i) with the leave of the Court, an order of committal;

...

[9] Given that the standard of proof is the criminal standard, an orderly manner of consideration involves the High Court first addressing its mind to whether the respondent had proved a *prima facie* case of contempt, and then to consider the appellant succeeded to raise a reasonable doubt. A

[10] The affidavit verifying facts by the respondent dated 27 April 2012 relied solely upon the sixth and other respondents failing to comply with the order: B

8. To date the 4th, 5th, 6th and 9th Respondents continue to interfere with the due administration of justice by failing to comply with all the terms of the High Court Order dated 11.8.2011. The Respondents have failed to purchase the Petitioner's shares in ICB-Griffin Marketing Sdn. Bhd. and ICB Manufacturing Sdn. Bhd. and/or failed to pay to the Petitioner the sums under the High Court Order. C

Grounds for Committal

9. The grounds upon which the relief is sought are that: D

- (i) The 4th, 5th, 6th and 9th Respondents' acts of disobedience, defiance and/or non-compliance of the High Court Order dated 11.8.2011 are in breach of the High Court Order duly indorsed with the penal notice; and
- (ii) The 4th, 5th, 6th and 9th Respondents' acts of non-compliance of the High Court Order dated 11.8.2011 have interfered with the due administration of justice. E

10. I therefore verily believe there is a *prima facie* case for contempt justifying leave for committal to be allowed.

[11] If the High Court addressed its mind to what were the acts of disobedience, defiance and interference with the due administration of justice, it would find these are arguments founded upon failure to comply with the order to pay RM6,134,033 to purchase the shares, which is not *ipso facto* refusal or neglect to comply with the order. F

[12] Instead, the High Court proceeded to outline the case for the appellant as follows: G

6th Respondent

In his Affidavit he states that he is unable to purchase the shares as he is impecunious. To show that he is impecunious he exhibited the following documents: H

- i. The Income Tax Self assessment Forms (YYFO-1 to YYFO-4);
- ii. Judgments against him (YYFO-6 and YYFP-7); and
- iii. Bank Statements form December 2011 – May 2012 (YYFO-7 to YYFO-10). I

A [13] The High Court then dismissed the evidence produced to support the defence of impecuniosity as follows:

B The said Self Assessment Form does not confirm 6th Respondent financial status as there is no evidence that the Inland Revenue Board accepted his self assessment of his financial status. As such the said document could not be relied on by this Court.

C The judgments against 6th Respondent is insufficient to show that he is impecunious. The 6th Respondent only provided the bank statement of one bank account only. He did not state in his Affidavit that he possessed only the said RHB account and neither did he provide his bank statements before December 2011. The RHB accounts seems to be an active account. Therefore the bank statements does not shed any light as to his impecuniosity (*sic*).

D The 6th Respondent claimed he had no financial ability but through searches made by the Petitioner it was discovered that 6th Respondent is a shareholder of a few companies and that he currently resides in a bungalow in an upscale neighbourhood. This facts have not been rebutted by the 6th Respondent.

E [14] The High Court failed to address its mind whether these raised a reasonable doubt whether the appellant could pay RM6,134,033. Instead, the High Court addressed its consideration to the question of impecuniosity, when the appellant had deposed in his affidavit of 20 July 2012 that:

F 24. Saya ingin memaklumkan kepada Mahkamah Yang Mulia ini bahawa walaupun perintah bertarikh 11.08.2011 tersebut memperuntukkan supaya saya membeli saham-saham Pempetisyen tersebut untuk sejumlah wang sebanyak RM6,134,033.00 namun saya tidak mempunyai wang sebegitu banyak untuk membeli saham-saham tersebut daripada Pempetisyen.

G [15] The reason for rejecting and not relying upon the income tax self assessment form is that it does not confirm the financial status of the appellant on the ground that there is no evidence accepted by the Inland Revenue Board. The High Court failed to take into consideration that an income tax self assessment form is not a mere statement since an individual who under-declares income or makes excessive claims for deductions or expenses is subject to penalty.

H [16] Similarly, the evidence of the judgements against the appellant in the High Court for the sums of RM2,600,000 and RM1,776,300, and in the Federal Court for costs RM50,000.

[17] The respondent's evidence is that he lived in an expensive locality but its evidence showed the house does not belong to him but to a company in which his wife is a director. There is little for the appellant to rebut.

I [18] In its conclusion/finding, the High Court referred to *Wee Choo Keong v. MBF Holdings Bhd & Anor and Another Appeal* [1993] 3 CLJ 210 FC where the Federal Court referred to *Eric Lau Man Hing v. Eramara Jaya Sdn Bhd & Ors* [1998] 3 CLJ Supp 126 FC, and held:

The Respondent in the instant case claimed that they had no money or assets but was unable to show in the Affidavits filed that they had accounts with limited funds or no funds in them or that they do not own any properties. Based on the facts and evidence, I am satisfied the contempt has been proven against the 4th, 6th and 9th Contemnors beyond all reasonable doubt on the following grounds:

- a. proper notice of the Order and have knowledge of its terms and the said injunction contained therein;
- b. a sealed copy of the Order and due notice were given and served;
- c. It has been established that the terms of the said Order contained in the Orders which were breached are clear and unambiguous.

I find there is proof beyond reasonable doubt that there has been contempt committed by the alleged contemnors for wilfully disobeying the order of this Court dated 11.8.2011. The Respondents are guilty of contempt of Court. Based on the above stated reasons, the application for an order of committal against the 4th, 6th and 9th Respondents is therefore granted. The application for an order of committal against the Respondents is therefore allowed.

[19] Findings in a court of law is not a matter of the judge being satisfied or believing a party or a witness and not the other, but upon what is the reasonable conclusion or finding that can be made upon facts that are safe to rely upon. For this purpose, a fact is safe to rely upon if it is not disputed, or is agreed or is a finding of fact on a disputed fact upon evidence that are safe to rely upon. Safe to rely upon in this context is if the fact or evidence is disclosed and not disputed, or upon checking and verification by the other party it is accepted or agreed.

[20] The three reasons given by the High Court show failure to comply, a conclusion which can be arrived when there is knowledge, which is proved in this instance by service of the order. Not obeying or with knowledge failing to obey is not, *ipso facto* without more, proof beyond reasonable doubt. It cannot, therefore, amount to a *prima facie* case where if no evidence is presented by the other party it is sufficient to warrant a finding of proof beyond reasonable doubt.

[21] Alternatively, the High Court failed to address its consideration to the correct question of whether, upon the reasonable findings that can be drawn upon the evidence by the appellant, the appellant had succeeded to raise a reasonable doubt.

[22] Accordingly, we made the orders stated earlier above.

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